WEST VIRGINIA SUPREME COURT OF APPEALS
CHARLESTON

SWVA, INC.,

Petitioner,

v.

CLAIM NO.: 2004-009712-HL
DOL: ~~8/28/03~~

ELMER ADKINS, JR.,

Respondent.

PETITION FOR APPEAL
SWVA, INC.

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STATEMENT OF THE CASE

The petitioner, SWVA, Inc. (hereinafter "employer"), brings this petition for appeal from the Workers Compensation Board of Review's April 7, 2006 ruling, which reversed the Office of Judges' January 20, 2005 decision. The Office of Judges' decision had affirmed a prior order dated September 15, 2003, which denied authorization for digital hearing aids, but did authorize standard hearing aids. The Board of Review ordered that digital hearing aids be authorized in this claim. In bringing this petition, the employer asserts the Board of Review's ruling is plainly wrong in view of reliable evidence. Specifically, the evidence fails to establish that digital hearing aids are reasonably required treatment in this claim. As indicated, the employer did authorize standard hearing aids and there has been no showing that standard hearing aids are not sufficient. Therefore, the employer respectfully requests that its petition be granted and that the Board of Review's April 7, 2006 order be reversed.

STATEMENT OF FACTS

The claimant completed a Report of Occupational Hearing Loss on or about May 29, 2003, reporting he had been exposed to noise from working in a steel production plant for 33 years. The physician's section of the application was completed by Dr. Charles Abraham. Dr. Abraham diagnosed sensorineural hearing loss and recommended a 10.27% impairment. Additionally, Dr. Abraham requested authorization for hearing aids (no type specified) *[See claimant's Report of Occupational Hearing Loss]*.

By order dated September 15, 2003, the Claims Administrator ruled the claim compensable *[See Claims Administrator's order dated September 15, 2003]*.

By separate order dated September 15, 2003, the claimant was granted authorization for standard binaural hearing aids *[See Claims Administrator's order dated September 15, 2003]*. The claimant protested this order.

In support of his protest, the claimant submitted a letter from Dr. Abraham dated October 9, 2003. Dr. Abraham opined that digital hearing aids would be better for the claimant - given the configuration of the claimant's hearing loss (loss in the high frequencies with no loss in the low frequencies). Dr. Abraham went on to expound upon the conveniences of digital hearing aids *[See Dr. Abraham's letter dated October 9, 2003]*.

The claim was subsequently submitted for final decision. By decision dated January 20, 2005, the Office of Judges affirmed the Claims Administrator's order, finding that the claimant was entitled to standard binaural hearing aids. In affirming the Claims Administrator's order, the law judge found that Dr. Abraham failed to state why standard

hearing aids were not appropriate. The law judge noted that Dr. Abraham's discussion of why programable hearing aids were more convenient did not medically justify their authorization *[See Office of Judges' decision dated January 20, 2005]*.

After an appeal by the claimant, the Board of Review, in its April 7, 2006 order, reversed the Office of Judges' decision and ordered that digital hearing aids be authorized. The Board of Review felt Dr. Abraham's explanation was sufficient to justify digital hearing aids *[See Board of Review order dated April 7, 2006]*. It is from the Board of Review's April 7, 2006 order that the employer petition this Honorable Court for an appeal.

STANDARD OF REVIEW

This Court has held that an order of the Appeal Board affirming the finding of the Commission will not as a general rule be set aside if there is substantial evidence and circumstances to support it. McGeary vs. State Comp. Dir., 148 W. Va. 436, 135 S.E.2d 345 (1964) (emphasis added). More recently, this Honorable Court reiterated its position that it "will not reverse a finding of fact made by the Workers' Compensation Board of Review unless it appears from the proof upon which the appeal board acted that the finding is plainly wrong." Conley v. Workers' Compensation Division , 199 W. Va. 196, 483 S.E.2d 542 (1997). "Moreover, the plainly wrong standard of review is a deferential one, which presumes an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence." Id.

POINTS OF AUTHORITY

Gibson v. State Comp. Comm'r., 127 W. Va. 97, 31 S.E.2d 555 (1944).

Estep v. State Comp. Comm'r., 130 W. Va. 504, 44 S.E.2d 305 (1947).

Barnett v. State Workers' Comp. Comm'r., 153 W. Va. 796, 172 S.E.2d 698 (1970).

Smith v. State Workers' Comp. Comm'r., 155 W. Va. 883, 189 S.E.2d 838 (1972).

West Virginia Code § 23-5-12.

W.Va. Code § 23-4-3.

DISCUSSION

BECAUSE THE EVIDENCE FAILS TO ESTABLISH THAT DIGITAL HEARING AIDS ARE REASONABLY REQUIRED TREATMENT IN THIS CLAIM, THE BOARD OF REVIEW WAS PLAINLY WRONG IN AUTHORIZING DIGITAL HEARING AIDS.

Pursuant to W.Va. Code § 23-4-3, the Workers' Compensation Commission is required to provide reasonably necessary medical treatment. Said treatment must be medically required for treating an injury or disease received in the course of or as a result of employment.

According to West Virginia Code § 23-5-12, if a decision of an administrative law judge is appealed, the Appeal Board shall reverse the findings of the administrative law judge, when the administrative law judge's findings are clearly wrong in view of the reliable, probative and substantial evidence on the whole record. The West Virginia Supreme Court of Appeals has defined the "clearly wrong" standard in its review of Workers' Compensation Appeal Board cases. According to the Court, a decision is clearly wrong if it is not supported by the evidence of record, if it is clearly against the preponderance of the evidence, or if it is based upon evidence which is speculative and inadequate. Gibson v. State Comp. Comm'r.,

127 W. Va. 97, 31 S.E.2d 555 (1944). Estep v. State Comp. Comm'r., 130 W. Va. 504, 44 S.E.2d 305 (1947). Barnett v. State Workers' Comp. Comm'r., 153 W. Va. 796, 172 S.E.2d 698 (1970). Smith v. State Workers' Comp. Comm'r., 155 W. Va. 883, 189 S.E.2d 838 (1972).

Here, the administrative law judge correctly found that digital programmable hearing aids were inappropriate because the evidence showed that such technologically advanced equipment was neither reasonable nor necessary. Therefore, the Board of Review was plainly wrong in reversing the Office of Judges decision.

While the programmable hearing aids may be better, there is no provision in the workers' compensation law allowing a claimant the best technology on the market simply because "it's the best". There was no showing by claimant that the standard binaural hearing aids were not sufficient, or that they were needed for a purpose other than convenience. Specifically, no *medical* purpose was given.

Although the claimant submitted a report from Dr. Abraham, Dr. Abraham did not state why digital hearing aids were medically necessary. Instead, Dr. Abraham expounded on the superiority of the programable hearing aids. While it is undisputed that digital hearing aids are more superior because they are easier to use, that alone does not justify their medical necessity. Given that digital hearing aids cost six or seven times as much as standard hearing aids, a medical necessity must be shown.

Dr. Abraham did not adequately explain why the digital hearing aids were medically necessary and reasonably required, or alternatively, why standard hearing aids would not be sufficient. Abraham did not give any specific medical reasons why the claimant needed

digital hearing aids. As the law judge found, Dr. Abraham's statement did not provide medical justification to warrant the authorization, and denied authorization for the programmable hearing aids.

Further, Dr. Abraham makes no indication of why standard hearing aids are not reasonable. As indicated, the employer did authorize standard hearing aids in this claim. Until such time that a showing is made that standard hearing aids are not reasonable treatment, it is inappropriate to authorize digital hearing aids. Therefore, the Board of Review's April 7, 2006 order is plainly wrong and should be set aside by this Honorable Court.

PRAYER FOR RELIEF

The employer respectfully prays that its Petition for Appeal from the Board of Review's April 7, 2006 order be granted by this Honorable Court.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 9th day of May, 2006, served the foregoing "Petition for Appeal" in an envelope properly addressed and postage prepaid upon:

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